

Decision No. C01-476

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00K-255T

DOCKET NO. 00A-174T

IN THE MATTER OF WESTERN WIRELESS HOLDING CO., INC.'S
APPLICATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS
PROVIDER PURSUANT TO 4 CCR 723-41-8.

DOCKET NO. 00A-171T

IN THE MATTER OF WESTERN WIRELESS HOLDING CO., INC.'S
APPLICATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS
CARRIER PURSUANT TO 4 CCR 723-42-7.

DECISION ON EXCEPTIONS

Mailed Date: May 4, 2001
Adopted Date: March 14, 2001

TABLE OF CONTENTS

I. BY THE COMMISSION.....	2
A. Statement.....	2
B. Discussion.....	2
1. Introduction.....	2
2. Designation of Western Wireless as an EP.....	6
3. ETC Designation and the Public Interest.....	15
4. Commission Oversight of Western Wireless.....	17
5. Disaggregation of Rural Study Areas.....	21
6. Commission Jurisdiction Over Western Wireless.....	27
7. Primary Line Designation.....	29
II. ORDER.....	31
A. The Commission Orders That:.....	31
B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 14, 2001.	32

I. BY THE COMMISSION

A. Statement

This matter comes before the Commission for consideration of Exceptions to Decision No. R01-19 ("Recommended Decision"). In that decision, the Administrative Law Judge ("ALJ") recommended that Western Wireless Holding Company, Inc.'s ("Western Wireless") applications be granted, and that the Stipulation between Western Wireless and intervenors, the Office of Consumer Counsel ("OCC") and Commission Staff ("Staff") be approved. Pursuant to § 40-6-109(2), C.R.S., the Colorado Telecommunications Association ("CTA") and Qwest Corporation ("Qwest") filed Exceptions to the Recommended Decision. Western Wireless, the OCC, and Staff filed a Joint Response to the Exceptions. Now being duly advised in the premises, we will deny the Exceptions, in part, and grant them, in part.

B. Discussion

1. Introduction

a. This consolidated proceeding (Docket No. 00K-255T) concerns Western Wireless' application for designation as an Eligible Telecommunications Carrier ("ETC") and its application for designation as an Eligible Provider

("EP").¹ The Commission consolidated the two applications. Designation as an ETC will enable Western Wireless to receive federal universal service support to provide certain telecommunications services. See 47 U.S.C. § 214(e), and Federal Communications Commission ("FCC") Rule 47 C.F.R. § 54.101. Designation as an EP will permit Western Wireless to receive monies from the state High Cost Support Mechanism ("HCSM") to provide telephone service. See § 40-15-208, C.R.S., and Commission Rules Prescribing the High Cost Support Mechanism and Prescribing the Procedures for the Colorado High Cost Administration Fund, 4 *Code of Colorado Regulations* ("CCR") 723-41 ("HCSM Rules"). Both the federal universal service fund and the state high cost fund are intended to promote universal telecommunications service in high cost areas.

b. Under the applicable federal statute and implementing FCC regulations, the state commission designates telecommunications carriers as ETCs within a state. 47 U.S.C. § 214(e), 47 C.F.R. §§ 54.101 and 54.201. Only common carriers may be designated as ETCs and only if, throughout the service area for which they seek ETC designation, they offer all those services eligible for federal universal service support

¹ Western Wireless' application for designation as an EP is Docket No. 00A-174T; the application for designation as an ETC is Docket No. 00A-171T.

(Rule 54.101), and they advertise the availability of such services and the charges therefor in media of general distribution. Where a carrier seeks ETC designation in an area served by a rural telephone company, the state commission must also find that such designation is in the public interest. See 47 U.S.C. § 214(e)(2).

c. The requirements for designation as an EP are set forth in Rule 8, 4 CCR 723-41. Carriers seeking EP designation must demonstrate "substantial compliance with the Commission's rules applicable to the provision of basic local exchange service." Such carriers must apply for designation as an ETC and, provide "such basic local exchange service as described in Sections 214(e) and 254 of the Communications of 1934" throughout the geographic support area. The Commission must also find that such designation serves the public convenience and necessity, as defined in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.

d. Before the ALJ, Western Wireless, the OCC, and Staff entered into a Stipulation and Settlement Agreement ("Stipulation"). That Stipulation provides that Western Wireless will receive ETC and EP designation under the conditions specified there. For example: Western Wireless will be designated an ETC immediately in those exchanges (Attachment 1 to the Stipulation) now served by Qwest. In exchanges now

served by CenturyTel (Attachment 2 to the Stipulation), Western Wireless will be designated an ETC pending approval of service area changes by the FCC.² In exchanges served by rural telephone companies (Attachments 3 and 4 to the Stipulation),³ Western Wireless will receive ETC designation effective September 1, 2001, pending any necessary FCC approval of service area changes.⁴ Furthermore, Western Wireless will be designated an EP immediately in Qwest and CenturyTel exchanges. Western Wireless will receive EP designation in rural exchanges effective September 1, 2001.

e. Western Wireless operates as a commercial mobile radio services ("CMRS") provider, and proposes to provide its basic universal service ("BUS") offering to meet ETC and EP requirements through its wireless network. As a CMRS provider, Western Wireless is exempt from state regulation pursuant to 47 U.S.C. § 332. Nevertheless, the Stipulation requires that

² As discussed *infra*, in many instances Western Wireless does not propose to serve the entire service areas of existing rural telephone companies. In these instances, the FCC and the Commission must both approve the revised service areas proposed by Western Wireless.

³ CenturyTel also meets the legal definition of a "rural telephone company" under federal statute, 47 U.S.C. § 153(37). However, the Stipulation distinguishes between CenturyTel and other rural companies because CenturyTel serves many more customers than the other companies, and, as such, is more similar to Qwest than to the small rural carriers.

⁴ Western Wireless will serve the entirety of those rural exchanges listed on Attachment 3 to the Stipulation. However, Western Wireless does not propose to serve the entire service area for those exchanges listed on Attachment 4 to the Stipulation.

Western Wireless provide its BUS offering in accordance with the rates, terms, and conditions contained in Attachments 5 through 7 to the Stipulation. Those Attachments set forth requirements similar to those applicable to local exchange service providers subject to regulation by the Commission. Pursuant to the Stipulation, the Commission may enforce those requirements against Western Wireless.⁵ For example, Western Wireless' BUS customers will be able to file formal complaints with the Commission, and the Commission may enter appropriate orders directing Western Wireless to take certain actions.

f. The ALJ recommended approval of the Stipulation with certain modifications discussed in the Recommended Decision. Qwest and CTA object to the Recommended Decision for the reasons discussed here.

2. Designation of Western Wireless as an EP

a. Both Qwest and CTA challenge Western Wireless' designation as an EP. According to the Exceptions: Western Wireless cannot be designated an EP as a legal matter.

⁵ The stipulating parties recognize that the Commission may not assert regulatory jurisdiction over Western Wireless in contravention of federal statutes. The rates, terms, and conditions set forth in the Stipulation with respect to the BUS offering and the Commission's enforcement authority all relate to Western Wireless' designation as an ETC and an EP. That is, the Stipulation provides for Commission oversight of Western Wireless for purposes of its designation as an ETC and an EP and, consequently, its receipt of federal and state universal support monies. The Commission, under the Stipulation, will not regulate Western Wireless' operations as a CMRS provider.

Section 40-15-208(2)(a), C.R.S., authorizes the Commission to establish the HCSM. Pursuant to that statute, only an entity certificated as a local exchange carrier ("LEC") can be designated as an EP. Certification as a LEC requires that a carrier offer local exchange service, as defined by Commission rules, and comply with all Commission rules applicable to local exchange service, such as the quality of service standards set forth in Commission Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2. Western Wireless is not now certificated as a LEC, and Western Wireless does not intend to obtain such certification. Therefore, Qwest and CTA argue, Western Wireless is legally precluded from being designated an EP.

b. Qwest and CTA further argue that designation of Western Wireless as an EP is discriminatory because it will not be subject to the same regulatory standards as other EPs (*i.e.*, the certificated LECs such as Qwest and the rural LECs). For example, all LECs are required to provide equal access to interexchange carrier service. Western Wireless, however, will not be subject to this requirement under the terms of the Stipulation. Qwest and CTA argue that, to obtain EP status, Western Wireless should be certificated as a LEC, and should comply with all rules and standards applicable to land-line LECs.

c. We disagree with these arguments. While § 40-15-208(2)(a), C.R.S., does state that the purpose of the HCSM is to provide support to "local exchange providers to help make basic local exchange service affordable," the statute does not require certification as a LEC to participate in the HCSM as an EP. Moreover, the interpretation of § 40-15-208(2)(a), C.R.S., advocated by Qwest and CTA would be inconsistent with state and federal law. Federal law (47 U.S.C. § 332(c)(3)(A)) (no State or local government shall have any authority to regulate the entry of or the rates charged by any CMRS providers) prohibits the states from imposing a certification requirement on wireless providers; therefore, the Commission has no legal authority to certificate wireless carriers. Qwest's and CTA's interpretation of § 40-15-208(2)(a), C.R.S., would, in effect, preclude wireless providers such as Western Wireless from providing service as EPs within the state.

d. In §§ 40-15-501 *et seq.*, C.R.S., the Colorado legislature has established the policy of encouraging competition in telecommunications markets, including the basic local exchange market, "to ensure that all consumers benefit from such increased competition." See § 40-15-501(1), C.R.S. We note that for telephone end-users in some high-cost rural areas, it is possible that the only realistic alternatives to incumbent land-line carriers will be wireless providers.

Qwest's and CTA's interpretation of § 40-15-208(2)(a) contravenes the legislature's desire that even consumers in high-cost rural areas benefit from competitive alternatives. Furthermore, in directing the Commission to establish universal support mechanisms for "basic service" in high-cost areas, the legislature mandated that funds from these mechanisms "shall be distributed equitably and on a nondiscriminatory, competitively neutral basis." See § 40-15-502(5), C.R.S. Precluding one class of telecommunications providers (*i.e.*, wireless carriers) from participating in the HCSM as EPs is directly inconsistent with these provisions.

e. With respect to federal law, the Joint Response points out that Qwest's and CTA's interpretation of § 40-15-208(2)(a), C.R.S., an interpretation that would preclude wireless providers from participating in the HCSM as EPs, would likely violate 47 U.S.C. § 253 (state regulation shall not prohibit any entity from providing any telecommunications service). Section 253(b) preserves a state's ability to impose requirements to preserve and advance universal service, providing these requirements are imposed "on a competitively neutral basis." Qwest's and CTA's position here would not result in a competitively neutral outcome.

f. Pursuant to the Stipulation, Western Wireless agrees to provide those services necessary for

designation as an ETC under federal law. Those services include: voice grade access to the public switched telephone network; local usage; dual tone multi-frequency signaling; single-party service; access to emergency service; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income customers. This package of services is substantially similar to the local exchange service offered by regulated LECs. Western Wireless has also agreed to provide its BUS offering subject to the rates, terms, and conditions specified in the Stipulation. Those rates, terms, and conditions are also substantially similar to the rules and standards applicable to regulated LECs. In sum, Western Wireless has agreed to provide service substantially similar to that offered by certificated LECs, at rates, terms, and conditions applicable to these LECs. As such, certification of Western Wireless as an EP fully complies with § 40-15-208(2)(a), C.R.S.

g. Qwest and CTA also object to the Stipulation because Western Wireless will not be required to comply with the identical regulatory requirements applicable to LECs. This, the parties argue, is improperly discriminatory. We disagree. First, we note that presently not even all jurisdictional LECs are regulated in precisely the same manner under federal and state law. For example, both federal and state statutes

recognize that it is appropriate to regulate incumbent LECs ("ILECs") differently than competitive LECs ("CLECs"). ILECs are subject to substantially different requirements than those applicable to CLECs. See 47 U.S.C. §§ 251-252; § 40-15-503, C.R.S. Our rules also recognize that it is appropriate to impose different regulatory requirements on CLECs as compared to ILECs. See Rule 3, Rules Regulating Applications by Local Exchange Telecommunications Providers for Specific Forms of Price Regulation, 4 CCR 723-38. Therefore, the observation that Western Wireless, with respect to its designation as an EP (and ETC), will not be subject to the identical Commission oversight as the LECs is not significant by itself.

h. Second, the requirements applicable to Western Wireless (in its provision of its BUS offering), as specified in the Stipulation, are substantially similar to those applicable to regulated LECs. Witnesses for Staff and the OCC testified that they identified important regulatory standards now applicable to regulated LECs, and included those in the Stipulation to be applicable to Western Wireless. Our review of the Stipulation indicates that Western Wireless' BUS offering will be subject to substantially similar standards as now apply to regulated carriers. Qwest and CTA identify only a few specific instances where Western Wireless will not be subject to the same requirements as apply to incumbent LECs: Western

Wireless will not be required to provide enhanced 9-1-1 service or equal access; Western Wireless will not be required to serve as a provider of last resort ("POLR"); the BUS offering is not subject to the statutory rate cap for local service; and Western Wireless will be able to establish local calling areas different than those of existing LECs. None of these differences are significant.

i. The record indicates that Western Wireless will provide 9-1-1 service as required of wireless carriers under FCC orders and rules. That Western Wireless may not provide E9-1-1 service will have no adverse impact on the LECs. If such a service is important to end-users, land-line LECs may possess a competitive advantage over Western Wireless. Similarly, Western Wireless' inability to provide equal access will result in a competitive advantage for land-line carriers if end-users regard this as a desirable service. There is no requirement that a carrier provide equal access to be designated an EP (or an ETC). Rule 8 of the HCSM Rules simply mandates that EPs be "in substantial compliance with the Commission's rules applicable to the provision of basic local exchange service," and that an EP "provide such basic local exchange service as described in Sections 214(e) and 254 of the Communications Act of 1934." Federal law does not require that Western Wireless provide equal access.

j. Next, we note that Colorado law does not require that an EP be a POLR. At the present time, only ILECs have been designated as POLRs; no CLEC has received or requested such designation. Designation of all ILECs as POLRs was appropriate. When the local exchange market was opened to competition by state and federal law, the ILECs owned (and still own) ubiquitous telephone networks that were funded, in large part, with monies from ratepayers. Neither Western Wireless nor any other new entrant is in the same position. Therefore, it is insignificant that Western Wireless will not act as a POLR when it becomes an EP and an ETC.

k. CTA's observation that Western Wireless' BUS offering will not be subject to the statutory rate cap is of little moment.⁶ We note that the initial price for the BUS offering is \$14.99, a price comparable to the statutory rate cap applicable to regulated LECs. While Western Wireless may increase the residential BUS rates above that amount, it must notify the Commission of any proposed rate change and the Commission may investigate and disapprove of such a change. Moreover, Western Wireless' rates in excess of any cap applicable to the LECs would give the LECs another competitive

⁶ The "rate cap" referenced by CTA is contained in § 40-15-502(3)(b), C.R.S. That statute sets a cap for residential basic local exchange rates, but does allow for rate increases above the cap for the reasons set forth in the statute.

advantage. As such, this difference in the oversight of Western Wireless, with respect to its designation as an EP, is likely to have no adverse effect on the LECs.

1. The final example of alleged preferential treatment of Western Wireless cited by CTA is that it will be able to establish local calling areas different than those of existing LECs. We agree with the Joint Response that this aspect of Western Wireless' BUS offering may be beneficial to end-users, and is the kind of service differentiation that should come with competitive markets. Some consumers may desire a local service with an expanded local calling area. It is in the public interest to allow for such consumer choice. There is no evidence that this component of Western Wireless' service will significantly harm existing LECs, not even the small rural LECs.

m. In general, the different regulatory oversight of Western Wireless, as compared to existing LECs, entailed in the Stipulation is appropriate. The Stipulation properly recognizes that not all existing regulatory standards that are applicable to land-line carriers should apply to a wireless provider. The Stipulation also establishes standards for the BUS offering that are substantially similar to those standards applicable to regulated local exchange service. Finally, neither Qwest nor CTA presented credible evidence or

argument that the different treatment for Western Wireless adversely affects existing LECs. We agree with the ALJ that Western Wireless' application for certification as an EP should be approved subject to the conditions discussed in this order.

3. ETC Designation and the Public Interest

a. Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. See 47 U.S.C. § 214(e); 47 C.F.R. § 54.201. In its Exceptions, CTA argues that designation of Western Wireless as an ETC in the areas served by rural telephone companies is not in the public interest. According to CTA, such action will have a significant, adverse impact on the rural companies. Those companies now serve few access lines, and likely cannot withstand the competitive challenge from Western Wireless. The Stipulation attempts to address this concern by delaying Western Wireless' entry into the rural areas until September 1, 2001. However, CTA asserts that this provision is insufficient to allow the rural companies to prepare for competition from Western Wireless. In light of the low customer densities and the slow rate of growth in access lines in rural exchanges, delaying designation of Western Wireless as an ETC until

September 1, 2001 will not assist the rural companies in any meaningful way. We disagree with these arguments.⁷

b. The Recommended Decision finds, and we agree, that CTA presented no evidence of any adverse impact on the rural ILECs as a result of granting Western Wireless' applications here. CTA's argument is based upon initial testimony (*i.e.*, prior to the Stipulation) from Staff witness Mitchell raising questions about the potential adverse financial effect on rural carriers if Western Wireless' applications were granted. However, Staff eventually addressed this concern in the Stipulation by agreeing to delay designation of Western Wireless as an ETC until September 1, 2001. This delay, Staff concluded, is sufficient to allow the rural companies to prepare for competition from Western Wireless.⁸

c. The ALJ also concluded that designation of Western Wireless as an ETC would benefit the public in certain respects. Both federal and state statutes establish the public policy of promoting competition in telecommunications markets.

⁷ CTA also asserts that the public-interest standard is unmet because Western Wireless will not provide E9-1-1 and will not, in many instances, serve the entire study area of the rural companies. As discussed, however, an ETC is not legally obligated to provide E9-1-1 service, and Western Wireless will provide the emergency services required of a wireless carrier. Additionally, the discussion *infra* explains that we are not now approving the disaggregated service areas proposed in the Stipulation for Attachment 2 and 4 exchanges.

⁸ Given our decision on disaggregation of rural study areas, the rural ILECs may have even more time to prepare for Western Wireless' entry into their service areas.

See 47 U.S.C. §§ 251-252; §§ 40-15-501 *et seq.*, C.R.S. The ALJ determined that designating Western Wireless an ETC would bring the benefits of competition to the rural areas. These benefits include increased customer choice for basic telephone service, product, and service innovation by telecommunications carriers, and incentives for efficiency on the part of competing carriers. The ALJ further noted that in some rural areas the ILECs cannot serve end-users without the installation of new facilities necessitating line extension charges. As a wireless carrier, Western Wireless could possibly serve these end-users without the need for service extension charges.

d. We agree with this analysis and conclude that designating Western Wireless as an ETC will result in benefits to the public. In light of CTA's failure to offer credible evidence of countervailing adverse impacts on the rural companies, we affirm the ALJ's conclusion that it is in the public interest to designate Western Wireless as an ETC.

4. Commission Oversight of Western Wireless

a. CTA argues that the Commission oversight of Western Wireless, as provided for in the Stipulation, is inadequate in certain ways: (1) the Stipulation does not ensure that the Commission can hear all customer complaints that might arise relating to the BUS offering; (2) the Stipulation fails to provide "meaningful remedies" against Western Wireless in

complaint cases; (3) the Stipulation is silent regarding Commission authority to correct rate abuses and rate discrimination; and (4) the Stipulation inappropriately delegates to Western Wireless the authority to establish local calling areas. The Recommended Decision determined that the Commission oversight provided for in the Stipulation is appropriate and we agree.

b. Notably, implicit in CTA's contention is the suggestion that Western Wireless should be subject to precisely the same requirements as regulated LECs. We rejected that argument in the above discussion. As for CTA's specific objections to the nature of Commission oversight provided for in the Stipulation, we respond: First, the Recommended Decision (pages 10 and 11) confirms that the Commission will have authority to hear formal customer complaints regarding the BUS offering:

Western Wireless has agreed in the Stipulation to a set of terms and conditions under which it will provide its BUS offering...Key provisions of the terms and conditions include the customer service policies, which require customer care personnel to be available 24 hours per day, 7 days per week. The customer care service personnel will attempt to resolve complaints, but will refer persons to the Commission Staff to resolve their complaints. It was clarified at hearing that should the informal mechanism prove insufficient, a customer of Western Wireless's BUS offering would have the right to file a formal complaint with this Commission concerning service problems...

Western Wireless does not dispute the Recommended Decision's clarification. We find that this complaint authority over the BUS offering is appropriate and adequate. As stated above, the Stipulation sets forth comprehensive terms and conditions for the BUS offering. Those terms and conditions are substantially similar to the requirements applicable to regulated LECs. Therefore, we disagree with the suggestion that the complaint authority provided for in the Stipulation is somehow inadequate.

c. The allegation that the Stipulation fails to provide "meaningful remedies" against Western Wireless in complaint cases is also mistaken. The terms and conditions for the BUS offering established in the Stipulation provide for credits and refunds for various occurrences (e.g., interruptions in service, billing errors, and failure by Western Wireless to provide service within prescribed time periods). Additionally, the Recommended Decision points out (page 13) that the Commission has the authority to revoke or suspend Western Wireless' ETC or EP status, or could alter the level of high cost support. Further, the market will provide a more immediate and unforgiving remedy than the Commission ever could. A Western Wireless customer dissatisfied with his service can switch. We conclude that these potential remedies are adequate to ensure that Western Wireless provides acceptable service to

consumers. CTA provided no credible evidence or argument to the contrary.

d. We also disagree with CTA's assertion that the Stipulation gives the Commission no authority to address "rate abuses" or "rate discrimination." Notably, the Stipulation (Attachment 7) specifies the rates and charges for the various components of the BUS offering. Western Wireless has agreed to impose these rates and charges on all BUS customers for the various services. These charges are comparable to those for similar services provided by regulated LECs. Moreover, under the Stipulation, the Commission is empowered to investigate proposed changes to these rates and charges (page 12 of the Stipulation), and Western Wireless will be required to change its rates and charges in response to Commission orders after investigation. These provisions give the Commission ample authority to oversee Western Wireless' BUS service.

e. Finally, CTA's argument that the Stipulation improperly delegates to Western Wireless the authority to establish local calling areas is misguided. The Stipulation (Attachment 6, pages 5 through 7) requires that Western Wireless establish local calling areas considering the community of interest principles and standards set forth there. Those principles and standards are essentially the same as those that

apply to regulated LECs. See Rule 17.3, Commission Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2. Additionally, the Stipulation (Attachment 6, page 5) requires that Western Wireless, "...provide local calling areas that include access to a comparable or greater number of access lines as that required of the incumbent carrier...." To the extent Western Wireless will offer to customers expanded local calling areas under the Stipulation, this is to consumers' benefit.

f. For these reasons, we reject CTA's arguments that Commission oversight of Western Wireless, with respect to its BUS offering and for purposes of its continuing designation as an ETC or an EP, is inadequate.

5. Disaggregation of Rural Study Areas

a. As discussed above, designation as an ETC or an EP permits a carrier to receive high cost support for service provided in the "service area" for which the designation is received. Section 214(e)(5) states:

The term 'service area' means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. *In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the (Federal Communications) Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.*

(emphasis added) FCC Rule 47 C.F.R. § 54.207 sets forth specific procedures to be followed by a state commission proposing to define a service area served by a rural company to be other than such company's study area. For example, the petition to the FCC by the state commission must contain the commission's official reasons for adopting a service area different than the rural company's study area. That petition must also include "an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company." 47 C.F.R. § 54.207(c)(1)(ii).

b. Western Wireless will not serve the entire study areas of those existing rural telecommunications companies listed on Attachments 2 (exchanges now served by CenturyTel) and 4 of the Stipulation.⁹ Western Wireless does not propose to serve the entirety of those study areas due to limitations on its licenses or because of limitations on its existing network. In the Stipulation, Western Wireless, the OCC, and Staff suggest that the Commission "disaggregate" certain rural study areas by

⁹ Attachment 1 relates to Qwest service areas. Because Qwest is not a rural telecommunications company, there is no legal requirement that Western Wireless serve the entirety of the listed study areas in order to be designated an ETC or EP. Neither is Attachment 3 at issue here, because Western Wireless does propose to serve the entire study areas listed there.

adopting each of the exchanges listed on Attachments 2 and 4 as its own ETC and EP service area. In those instances where Western Wireless will not serve the entire study areas of existing rural companies, the Commission, according to the Stipulation, would submit a formal petition to the FCC requesting approval of the new ETC service areas. The Stipulation further proposes that the Commission conduct further proceedings to disaggregate all ETC study areas in the state, especially those study areas not addressed in the Stipulation itself. CTA excepts to these proposals.

c. CTA argues that in order to protect universal service, "avoid gaming of the support system," and to ensure that high-cost monies go to support service to truly high-cost customers, any disaggregation proceedings must involve a two-step process: (1) allocation of support between exchanges; and (2) targeting of support by zone within each exchange. The Stipulation fails to do this. Furthermore, CTA contends, neither does the Stipulation take into account recent guidance from the Joint Board on disaggregation of rural company study areas. CTA suggests that the Commission consider disaggregation of rural study areas in a single proceeding; disaggregated study areas and the amounts of targeted support should be established in that proceeding and be applied to all companies seeking designation as an ETC or EP in rural areas. Finally, CTA

objects to the Stipulation's treatment of CenturyTel. Specifically, CTA notes that CenturyTel is a rural telephone company under federal and state law. Therefore, there is no acceptable reason to treat CenturyTel differently from other rural companies. The Stipulation, nevertheless, would result in immediate designation of Western Wireless as an EP in CenturyTel's study area, even though Western Wireless will not serve the entirety of that study area.

d. The Joint Response states that neither Western Wireless, the OCC, nor Staff objects to future disaggregation proceedings as suggested by CTA. However, the parties contend, Western Wireless' present application should not be delayed pending those future proceedings. Such delay would improperly defer competition in rural areas. The Joint Response suggests that the Commission has already determined that EP designation should be on a wire center basis rather than a study area basis (citing Rule 41-8.2.1.2). Establishing ETC service on a wire center basis is consistent with that existing policy. The Joint Response notes that the Stipulation contemplates further disaggregation proceedings before the Commission (*i.e.*, the long-term disaggregation docket) and the FCC (*i.e.*, the Commission's petition to the FCC to establish new service areas in accordance with the Stipulation). CTA's concerns can be fully addressed in those future cases.

e. We will grant CTA's exceptions on this point. We agree with CTA that, in cases where new entrants will act as ETCs or EPs in rural areas, it is important to "target" high cost support for those areas. This step is necessary to prevent inappropriate practices that could seriously affect the existing rural ILECs, such as "cream-skimming" of customers, especially where a new entrant will not serve the entire study area.

f. With respect to designation of Western Wireless as an ETC, we note that the FCC must specifically agree to the new service areas reflected on Attachments 2 and 4. The Commission, by approving the Stipulation, would essentially endorse the service areas on those Attachments and would commit to filing a formal petition with the FCC consistent with that endorsement. The Commission's petition to the FCC must explain our reasons for suggesting the specific service areas listed in the Attachments and must provide an analysis taking into account the recommendations of the Joint Board. Notably, there is insufficient evidence in this record that would permit us to take these steps--steps that would be necessary to any petition to the FCC. Inasmuch as we are unable at this time to commit to filing a petition with the FCC reflecting the specific service areas suggested in Attachments 2 and 4, we will not approve this portion of the Stipulation.

g. As for Western Wireless' request for EP status in the disaggregated study areas: We again emphasize the importance of targeting all high cost support, including support from the HCSM, before designating additional EPs for rural areas, especially where new entrants do not propose to serve the entirety of the study areas. We also agree with CTA that the Commission should consider disaggregation of rural areas in a proceeding of general applicability. Presently, other companies besides Western Wireless have requested EP designation in rural areas. We also observe that the Joint Response is incorrect in stating that the Commission has already determined that EP designation should be on a wire center basis, rather than a study area basis, for rural companies. Rule 41-8.2.1.2 requires that an EP provide service "throughout the entire Geographic Support Area." Rule 41-2.8 does define "Geographic Area" as an area of land "*usually* smaller than an incumbent provider's wire center" (emphasis added). However, Rule 41-2.10 defines "Geographic Support Area" as an area "where the Commission has determined that the furtherance of universal basic service requires that support be provided by the HCSM." With respect to rural telephone companies, the HCSM now provides support *on a study area* basis. Therefore, at this time, the Commission has not endorsed service areas smaller than study areas for rural companies.

h. The Commission agrees with Western Wireless that, as a general matter, telephone competition in all rural areas is likely to be in the public interest. For that reason, the Commission will undertake to disaggregate rural study areas as soon as practically possible. Until that time, however, we do not approve of the Stipulation's proposed disaggregation of Attachments 2 and 4 exchange areas.

i. Finally, we agree with CTA that, because CenturyTel does meet the legal definition of a rural telecommunications company, it should be treated in the same manner as other rural companies with respect to disaggregation of its study areas. Our ruling on Attachment 2, *supra*, resolves CTA's concern.

6. Commission Jurisdiction Over Western Wireless

a. Next CTA argues that the Commission has full regulatory jurisdiction over Western Wireless' BUS offering either as basic local exchange or as a fixed wireless service. The Recommended Decision, CTA notes, concluded that the Commission is preempted from regulating the BUS offering because it is CMRS service under § 332(c)(3) of the Communications Act of 1934. However, CTA points out that the FCC is presently considering whether Western Wireless' BUS offering in Kansas is fixed wireless service and, as such, subject to state regulation.

b. CTA observes that Western Wireless will provide its service using customer premises equipment manufactured by the Telular Corporation ("Telular"). That equipment, unlike a conventional cellular or PCS handset, does not itself provide access to the public switched network. Rather, the Telular unit can provide dial tone only when connected to a telephone, fax, or modem. CTA asserts that in light of the Telular unit's size--it weighs over six pounds equipped with batteries--and the necessity of operating it in conjunction with a telephone, fax, or modem, the BUS offering is really fixed wireless service. This service is subject to full regulation by the Commission.

c. The Joint Response contends: The ALJ correctly determined that the BUS offering is CMRS service not subject to Commission regulation. The Telular unit is a "mobile station" as defined by the FCC (47 C.F.R. § 22.99); it is not affixed to a particular location and can operate while moving. In any event, the Commission need not determine this issue (*i.e.*, whether the BUS offering is exempt from Commission regulation as CMRS) in this docket. As CTA points out, the FCC is now considering whether Western Wireless' BUS offering is CMRS or fixed wireless service.¹⁰ The FCC, not this Commission,

¹⁰ *In the matter of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Order*, Docket No. WT-00-239.

is the proper agency to determine whether Western Wireless' BUS offering is exempt from state regulation as a result of § 332(c)(3). Moreover, even if the BUS offering does not qualify as CMRS service under federal law, the Commission still cannot assert regulatory authority here because cellular service is exempt from regulation under state law, specifically § 40-15-401(1)(b), C.R.S.

d. We agree with the Joint Response that we need not decide whether the BUS offering is subject to Commission regulation as fixed wireless service. At this time, the FCC is the appropriate agency to consider whether Western Wireless' service is CMRS service and exempt from state regulation under § 332(c)(3). In light of the pendency of this issue at the FCC and inasmuch as the Stipulation now ensures appropriate Commission oversight over Western Wireless in its role as an EP and ETC provider, no reason exists to address the issue at this time. We defer *all* questions concerning the Commission's regulatory jurisdiction over the BUS offering. Therefore, this decision should not be interpreted as an agreement with the ALJ's ruling that § 40-15-401(1)(b), C.R.S., precludes Commission regulation here.

7. Primary Line Designation

a. CTA finally objects to the ALJ's recommendation concerning which provider, where both Western

Wireless and the existing ILEC provide basic local service to a customer, is entitled to receive support from the HCSM. (Under the HCSM Rules, only the first access line at residential or business premises is eligible for HCSM support.) The ALJ recommended that where both Western Wireless and the ILEC provide service to a customer, the customer should designate which carrier receives the high cost support. CTA argues that the evidence fails to support the Recommended Decision on this point. Further, CTA suggests, this decision is premature. Specifically, CTA contends that many policy and administrative questions are raised by the ALJ's recommendation. For example, how would the HCSM administrator track which carrier has been designated for support by specific customers; how would the customer change the designation regarding the carrier eligible to receive HCSM support; what protections would exist to prevent "slamming" of a customer's HCSM designation; etc.

b. We will grant CTA's exceptions on this point. In addition to the administrative questions left unaddressed in this docket by the Recommended Decision, we note one further concern. Pursuant to Rule 3, Commission Rules Prescribing the Procedures for Designating Telecommunications Service Providers as Providers of Last Resort or as an Eligible Telecommunications Carrier, 4 CCR 723-42, existing ILECs have been designated POLRs in their service areas. This status

requires the ILECs to serve all customers in their service territories. As part of this obligation to serve, the ILECs are even required to extend facilities to meet all new demand for service. Western Wireless, in contrast, has not requested and will not be designated a POLR. Inasmuch as the ILECs, as POLRs, are legally obligated to meet all demand for service, it is appropriate that high-cost support go to the ILEC in all cases where it provides service to a customer. The ALJ's recommendation that the end-user choose whether the ILEC or Western Wireless will receive high-cost support, in cases where both carriers provide service to a customer, will not be accepted.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Decision No. R01-19 filed by Qwest Corporation are denied.

2. The Exceptions to Decision No. R01-19 filed by the Colorado Telecommunications Association are granted only to the extent consistent with the above discussion and are otherwise denied.

3. The Stipulation and Settlement Agreement between Western Wireless Holding Co., Inc., the Colorado Office of Consumer Counsel, and Commission Staff dated November 14, 2000

is approved subject to those modifications set forth in Decision No. R01-19, and only to the extent consistent with the above discussion. In particular, Western Wireless Holding Company, Inc.'s request for designation as an Eligible Telecommunications Provider and an Eligible Provider in those exchanges listed in Attachments 2 and 4 of the Stipulation is denied. Additionally, where Western Wireless Holding Company, Inc., and an existing incumbent local exchange carrier provide service to the same customer's premise, the designated provider of last resort shall receive support from the High Cost Support Mechanism.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 14, 2001.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER POLLY PAGE ABSENT.